

1955

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
3 HONORABLE WINTON MC KIBBEN, JUDGE PRO TEM PRESIDING  
4 DEPARTMENT X-5

5 ---oOo---

6 MILTON J. HOROWITZ, et al.,  
7 Plaintiffs,  
8 vs. No. 965245  
9 RAYBESTOS-MANHATTAN, et al.,  
10 Defendants. /

11

12

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS AUGUST 24, 1995

14 JURY TRIAL

15

16 A P P E A R A N C E S

17 For the Plaintiffs: WARTNICK, CHABER, HAROWITZ, SMITH &  
TIGERMAN

18 By: MADELYN J. CHABER, Attorney at Law

19 For the Defendants: PREUSS, WALKER & SHANAGHER

20 By: CYNTHIA C. ROENISCH, Attorney at Law

21 FENTON & KELLER By: RONALD F. SCHOLL, Attorney at Law

22 NUTTER, MC CLENNEN & FISH

23 By: STEPHEN J. BRAKE, Attorney at Law

24 SHOOK, HARDY, & BACON By: WILLIAM S. OHLEMEYER, Attorney

at Law

25

26

27

28 REPORTED BY: JOANNE M. FARRELL, CSR NO. 4838

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1956

1 I N D E X

2

PLAINTIFFS' EXHIBITS

3

NO. IDENTIFICATION IN EVIDENCE

4

11 - 13 1994

5 21 1994

29 1994

6 87 1994

104 1994

7 112 - 130 1994

133 1994

8 135 - 142 1994

147 1994

9 149 - 153 1994

155 - 157 1994

10 161 - 167 1994

169 - 185 1994

11 190 1994

196 1957

12

13

DEFENDANTS' EXHIBITS

15 NO. IDENTIFICATION IN EVIDENCE

16 N 1985

O 1985

17 R 1985

W 1985

18 X 1985

Y 1985  
19 AA 1985  
DD 1985  
20 VV 1957 1981  
WW 1957 1981  
21 XX 1957 1981  
22 ---o0o---  
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24  
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27  
28

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1957

1 P R O C E E D I N G S

2 THE CLERK: Plaintiffs' Exhibit 196, letter dated  
3 March 3rd, 1955 to Anacker, A-n-a-c-k-e-r, premarked.  
4 (Plaintiffs' Exhibit 196 marked for identification.)  
5 THE CLERK: Defendants' Exhibit VV, outpatient  
6 radiology report, Defendants' Exhibit WW, Tower Imaging  
stat  
7 report, and Defendants' Exhibit XX, CT scan report, marked  
8 for identification, premarked.  
9 (Defendants' Exhibits VV, WW and XX marked for  
10 identification.)  
11 THE COURT: Good morning. Ladies and gentlemen.  
12 JURORS: Good morning.  
13 THE COURT: Glad we are all here, everybody is, so you  
14 may proceed, Ms. Chaber.  
15 MS. CHABER: Your Honor, I was just going to publish a  
16 couple of documents.  
17 THE COURT: All right.  
18 MS. CHABER: Let me just show them to counsel first so  
19 there's no question.  
20 THE COURT: Go ahead, please.  
21 MS. CHABER: Okay. I'm just going to read portions of  
22 the documents that will be in evidence. And I want to  
read  
23 the numbers off so because there's some confusion on  
what's  
24 in evidence and what isn't at this point.  
25 THE COURT: All right.  
26 MS. CHABER: Document 137, 112, 140, 185, 116.  
27 THE COURT: Did you say '15 or '16?  
28 MS. CHABER: '16. 114, 145 and 27.

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1958

1 The first is 137. It's The Journal of the American  
2 Medical Association, edited for the association under the  
3 direction of the board of trustees by Morris Fishbein, MD.  
4 And it is volume 140, which is August 1949. And the title  
5 of the editorial is "Asbestosis and Cancer of the Lung."  
6 And it states that, "Until recently, the coexistence  
7 of asbestosis and cancer of the lung was considered by  
8 many investigators a coincidence. Since 1935, 23 such  
9 cases were recorded by American, English and German  
10 physicians. Wedler noted 14 cases of asbestosis  
11 cancer in a series of 92 necropsies on patients with  
12 asbestosis or about 15 percent of cancer of the lung  
13 in persons who died from this industrial disease. The  
14 exposure time ranged from 3 to 27 years, average 15  
15 years. The ages in 17 cases were 35 to 75 years,

16 average 50 years. Until now the question of a causal  
17 relation between asbestosis and cancer of the lungs  
18 has been an open one. A causal relationship between  
19 asbestosis and cancer of the lungs is supported by the  
20 following observations: The incidence rate of cancer  
21 of the lung in this group is excessive, since the  
22 normal death rate from cancer of the lung among adults  
23 examined at necropsy at present is about 1 percent of  
24 all necropsies. Moreover, there is a distinct shift  
25 in the sex distribution of cancer of the lung and a  
26 series of asbestosis cancers recorded from England.  
27 The male female sex ratio is 2.4 to 1, while it is 5  
28 to 1 for cancers of the lung in general. This shift

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1959

1 indicates that an environmental and evidently  
2 occupational carcinogen was active in the asbestosis  
3 group tending to equalize the incidence rate of cancer  
4 of the lung for both sexes." It goes on for another  
5 page.

6 And then on the second portion. "Since some 20,000  
7 workers are employed in the asbestos-producing  
8 industries of this country and Canada and many  
9 additional thousands in various asbestos-consuming  
10 industries, increased attention to this probable  
11 occupational hazard of cancer of the lung by the  
12 medical profession is desirable."

13 Next is Plaintiffs' Exhibit 112. It's on the  
14 letterhead of Lorillard Research Laboratories, P.  
Lorillard

15 Company, dated March 12th, 1952. And it says:

16 "Dear Doctor: P. Lorillard Company has recently  
17 introduced Kent cigarettes, a new filter-tipped  
18 cigarette, which we believe to be worthy of your  
19 attention. For your information and in the interests  
20 of those patients whom you have felt obliged to advise  
21 to cut down or cut out smoking, we are enclosing a  
22 brochure which discusses in some detail the  
23 physiological advantages of the Micronite filter which  
24 is used in our Kent cigarettes.

25 "Within the near future, a complete report on our  
26 Micronite filter will appear in the leading medical  
27 journal. At that time, reprints of the article will  
28 be available. If you will complete and return the

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1960

1 enclosed card, we will be glad to see that you  
2 received the number of reprints you desire.

3 "As you know, Lorillard has carefully avoided the  
4 use of questionable medical claims in its Old Gold  
5 advertising. The company is not contemplating any  
6 change in this policy for Kents. We do feel, however,  
7 that the performance of the Micronite filter has a  
8 direct bearing on health and cigarette smoking.

9 "We really believe that we have a good thing  
10 here. We are hoping that when you have read the  
11 enclosed brochure and smoked the physician's  
12 gift box of Kent cigarettes which we are forwarding,  
13 you will be as convinced of their merit as we are."

14 Plaintiffs' Exhibit 140, dated August 14th, 1953 from

15 H.B. Parmele, Ph.D., Director of Research, P. Lorillard  
16 Company, to Morris Fishbein, the Hotel Claridge, London,  
17 England.

18 "Dear Dr. Fishbein: Mr. Halley has asked me to  
19 send you the enclosed clipping from Advertising Age  
20 August 3rd, 1953. The article covered in this  
21 clipping is taken from Dr. Wolman's report in the JAMA  
22 of July 4th, 1953. The title of the clipping 'Filter  
23 Tips Don't Filter Much, AMA Cigarette Research  
24 Discloses,' indicates the damage Dr. Wolman's  
25 questionable conclusions can do. Mr. Halley is  
26 considerably exercised about the situation, but I do  
27 not know what we can do about it. Perhaps you may  
28 have some idea in the matter. It certainly  
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1961

1 illustrates the need of an edited press release such  
2 as we have for Dr. Friedell's September talk.  
3 However, a similar precaution does not apply against a  
4 printed report such as Dr. Wolman's. It is  
5 certainly a shame that Dr. Wolman drew what, in  
6 your and our opinion, are incorrect conclusions.  
7 Since the harm has already been done, we doubt that  
8 anything can be gained by correspondence with \*\*doctor  
9 Wall man or the editorial staff of the JAMA," Journal  
10 of the American Medical Association. "However, any  
11 comments which you may have in the matter will be  
12 appreciated.  
13 "We hope that you had a pleasant voyage  
14 and both you and Mrs. Fishbein are enjoying your  
15 sojourn in London."  
16 Next is Plaintiffs' Exhibit 185, and it's a portion of  
17 a Newsweek article dated March 24th, 1952. And under  
18 "Cigarettes: New Filter Entry," it indicates that:  
19 "The biggest news in Kents, said Lorillard, is  
20 the nature of the filter. Called Micronite, it  
21 contains a secret mineral which is supposed to remove  
22 60.7 percent of tars and nicotine.  
23 "The mineral ingredient was discovered in Africa  
24 by the Germans, who used it in their gas masks during  
25 the last war. In 1943, U.S. troops captured some of  
26 the masks and scientists set to work to figure out  
27 what was in them. It took about a year. Then the  
28 mineral was incorporated in American gas masks. Later  
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1962

1 it was passed on to the Atomic Energy Commission,  
2 which now uses it to filter radioactive gases from the  
3 air in its plants."  
4 Exhibit 116 is an August 3rd, 1953 letter from  
5 Dr. Parmele at Lorillard to a Mr. John H. Teeter,  
6 T-e-e-t-e-r, executive director, Damon Runyon Memorial  
Fund.  
7 "Dear Mr. Teeter: In your letter to us of July  
8 31st we presume you were referring to Dr. Horris  
9 Fishbein rather than Dr. Fishburn.  
10 "In answer to your question, permit us to state  
11 that Dr. Fishbein is not a member of our organization.  
12 However, approximately a year ago Dr. Fishbein became  
13 interested in our Kent cigarettes with the new  
14 'Micronite' filter. Because of this interest, he has  
15 aided us in placing certain physiological projects or  
16 studies, some of which have already indicated the  
17 extremely interesting benefits to be derived from  
18 smoking high-filtration cigarettes, such as Kents.  
19 These studies are in no sense" --

20 Do you want me to skip the next sentence? Okay.  
21 "These studies are in no sense related to the cancer  
22 field."

23 "Dr. Fishbein is a friend of Dr. Lanza and is  
24 acquainted with the 'air pollution' studies in which  
25 we are all interested. We believe that he highly  
26 approves of this work with the reservations that we  
27 all must make.

28 "Dr. Fishbein is quite a busy man and we doubt  
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1963

1 that there would be anything gained by you meeting  
2 with him at the present time. However, perhaps at  
3 some future date and subject to Dr. Lanza's approval,  
4 it would be interesting to have Dr. Fishbein sit in on  
5 one of our meetings."

6 Next is Plaintiffs' Exhibit 114 from Parmele to Morris  
7 T. Friedell, MD, Chicago, Illinois.

8 "Dear Dr. Friedell: We are somewhat embarrassed  
9 but not surprised in the contents of your letter to us  
10 of March 13. Kent filters are supposed to be 11  
11 millimeters in length. Such cigarettes are formed in  
12 the machine in one continuous length and a properly  
13 timed knife cuts them into the desired increments.  
14 Sometimes the action of the knife is out of time and  
15 gives rise to a filter that is short in length and a  
16 corresponding filter which is too long. This is a  
17 mechanical problem with which we are continually  
18 concerned. Another mechanical discrepancy which  
19 occasionally occurs is the unfortunate occurrence of a  
20 cigarette filter which is mushy or lacking in  
21 firmness. A situation of this kind arises when the  
22 amount of material going into the filter is deficient.

23 "In order to avoid having either of the above two  
24 mechanical flaws interfere with your experimental  
25 work, we might suggest that just to be safe, you  
26 examine two or three cigarettes from each package to  
27 be used in your experiments. In this way you would be  
28 in a position to discard packages which are faulty.

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1964

1 We certainly trust that only a very small portion of  
2 our production comes under this category. In our  
3 opinion, filters which display a material deficiency  
4 are much more apt to upset your experiments than those  
5 which are cut slightly short of the 11 millimeter  
6 optimum. If you do not mind observing the above  
7 precautions, we believe that this constitutes a better  
8 solution to the situation in question than having us  
9 send you selected cigarettes of predetermined quality.  
10 The latter would be somewhat of a departure from  
11 recognized ethical procedures.

12 "With kindest regards, we wish to remain," signed  
13 by Parmele.

14 Next is Plaintiffs' Exhibit 145, February 12th, 1954  
15 on the letterhead of P. Lorillard Company. It's stamped  
16 approved from the board of directors of March 17th, 1954  
17 addressed to Morris Fishbein.

18 "Dear Dr. Fishbein: We wish to thank you for  
19 your letter of February 8th and also for signing and  
20 returning to us the copy of the letter of agreement  
21 which we prepared for the purpose of covering our  
22 contemplated projects for the current calendar year.

23 "We are very pleased that you have succeeded in  
24 lining up Dr. Pearlman to conduct certain tests on a  
25 group of interns at the Cook County Hospital for the  
26 purpose of demonstrating the improvement which can be  
27 anticipated in irritated throats and coughs by the use  
28 of Kent cigarettes. We note that this project is to  
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1965

1 get underway almost immediately, and will presumably  
2 continue for two or three months. We further note  
3 that the estimated cost of this study will be between  
4 four and five thousand dollars which will include  
5 subject fees, a satisfactory remuneration for  
6 Dr. Pearlman, and any other incidental expenses  
7 incurred. However, it is understood that this amount  
8 will not include the cost of the Kent cigarettes  
9 employed. These will be sent by our sales department  
10 direct to Dr. Pearlman at weekly intervals. Delivery  
11 of such cigarettes will start very shortly, but we  
12 will delay sending any money until you indicate the  
13 proper time. As a matter of fact, we note that in  
14 your opinion Dr. Pearlman may wait until completion of  
15 the experiment before requiring any other funds  
16 above mentioned, and that whenever such money is to be  
17 sent, we understand that it may be best that it be  
18 sent to you for transfer to Dr. Pearlman.

19 "If the above arrangements are satisfactory and  
20 meet with your approval, will you or Dr. Pearlman sign  
21 on the lined indicated below and return one copy."  
22 And on the signature line below is the signature by  
23 Samuel Pearlman, MD.

24 The last one is Plaintiffs' Exhibit 27. It's a  
25 handwritten letter from J.M. Silver, MD and says:  
26 "Report to Dr. S. Pearlman from J.M. Silver, MD,  
27 5/12/54. White male physician age 31." It says:  
28 "Approximately five months ago I discarded the  
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1966

1 other cigarettes and started smoking 'Kents.' Since  
2 that time I have not been troubled with cough and the  
3 morning expectoration has decreased considerably.

4 "I must say that it required several months of  
5 smoking 'Kents' to actually become accustomed to this  
6 type of cigarette. The objection that I have is the  
7 metallic taste which exists in the mouth following the  
8 excessive (more than 30) smoking of Kents.

9 "The other concern I have had is the effect of  
10 the asbestos which is used in the filter. There have  
11 been unofficial reports of cases of asbestosis found  
12 in people smoking Kents and said to be solely a result  
13 of such smoking.

14 "I have no known pulmonary, nasal or sinus  
15 disease, either acute or chronic.

16 "As an individual the study conducted is of value  
17 but I feel that as a usable or, let me say, as a valid  
18 study on a group of people, it is not scientifically  
19 valid, for it depends upon subjective reports which  
20 may be psychologically tempered.

21 "The subjects used were not absolutely sure that  
22 they did not have mucus membrane or pulmonary chronic  
23 disease before evaluating the effect of 'Kents' or any  
24 other cigarette.

25 "I feel that as an individual, 'Kent' served my,

26 purpose, but I would like to see a scientific  
27 investigation of the effects of the asbestos contained  
28 in the filter.

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1967

1 "Jerome M. Silver, MD, Chicago, Illinois."

2 That's the end of plaintiffs' reading.

3 THE COURT: All right.

4 MR. OHLEMEYER: Continuing with the defense case, Your  
5 Honor.

6 THE COURT: Very good.

7 MR. OHLEMEYER: I would like to publish portions of  
8 exhibits previously marked for identification.

9 (Pause.)

10 MR. OHLEMEYER: This is Defendant's Exhibit N. It's a  
11 July 4th, 1953 edition of the Journal of the American  
12 Medical Association. An article at page 917, a study of  
13 cigarettes, cigarette smoke and filters.

14 MS. CHABER: Please read the author.

15 MR. OHLEMEYER: By Walter Wolman, Ph.D., Director of  
16 the Chemical Laboratory of the American Medical  
Association.

17 In the first paragraph it is reported that "they," meaning  
18 the cigarettes used in the study, represent the three  
types

19 of filter tips on the market, namely paper, asbestos and  
20 cotton. And this is page 918 of the article, a reference  
to

21 Table 1, where brand B-1 and B-2 is described as asbestos  
22 laminated with paper.

23 Next is Defendants' Exhibit W, December 1953 Fortune  
24 magazine at page 162, "Kent treated asbestos on crepe  
25 paper."

26 Next is Defendant's Exhibit X, Business Week, March  
27 27th, 1954, page 176. "P. Lorillard Company's Kent uses a  
28 blend of acetate, cotton and mineral fiber, a kind of

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1968

1 asbestos called crocidolite."

2 Your Honor, Defendants' Exhibit Y, which is Consumer  
3 Reports magazine, February of 1955, page 58:

4 "Open up the filter tip of different cigarettes and  
5 you will find a variety of things -- absorbent cotton,  
6 paper containing activated carbon, cellulose acetate  
7 fibers, creped and uncreped paper, asbestos fibers or  
8 combinations of several of these materials."

9 MS. CHABER: Could I have that for a moment?

10 MR. OHLEMEYER: The next exhibit, Your Honor.

11 MS. CHABER: I possibly wanted to read another portion  
12 of this, Counsel.

13 (Pause.)

14 MS. CHABER: I'd like to read this portion.

15 MR. OHLEMEYER: Sure.

16 MR. OHLEMEYER: What page is it?

17 MS. CHABER: It's page 64. I'm going to read from the  
18 line above.

19 "Most of the filters are made of finely creped  
20 (crinkled) paper, absorbent cotton and cellulose  
21 acetate fibers either alone or in combination. Some  
22 have added 'purifying agents,' such as Herbert  
23 Tareyton's activated charcoal, and Kent's patented  
24 Micronite, an asbestos-like substance."

25 MR. OHLEMEYER: Exhibit Z, Your Honor, is the April

26 9th, 1955 edition of the Journal of the American Medical  
27 Association, an article that appears on page 1309, Walter  
28 Wolman, Ph.D., Director of the Chemical Laboratory of the  
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1969

1 American Medical Association. And the table at page 1320  
2 describes brand Bfk as asbestos laminated with paper.

3 This is an advertisement, Defendants' Exhibit SS, for  
4 Kent cigarettes, in which the text of the advertisement  
5 refers to the July 4th, 1953 Journal of the American

Medical

6 Association, volume 152, number 10, article at page 917,  
and

7 refers to the April 9th, 1955, Volume 154, number 8, page  
8 678 article from the Journal of the American Medical  
9 Association.

10 Next exhibit, Your Honor, is Defendants' AA. It is  
11 the April 16th, 1956 edition of Chemical and Engineering  
12 News. And in a chart at page 1847 labeled "Who Uses  
What,"

13 Kent with cellulose acetate and cotton is described as  
using

14 crocidolite, (asbestos-like material).

15 The next exhibit is Defendants' CC, Your Honor, August  
16 1957 Reader's Digest, and the reference at page 46 is --

17 MS. CHABER: Excuse me. I don't think this is a  
18 document that was agreed upon. And, in fact, I have an  
19 objection. It's after the fact, Your Honor. It's August  
20 1957. This wasn't one of the ones that was agreed upon.

21 MR. OHLEMEYER: Yes, it was.

22 MS. CHABER: No, it wasn't.

23 MR. OHLEMEYER: This is what I'd like to read, this  
24 sentence.

25 MS. CHABER: This was not agreed upon, Your Honor.

26 THE COURT: We will have to talk about it outside the  
27 presence of the jury. Go ahead with your other items,  
28 please.

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1970

1 MR. OHLEMEYER: The next one, Your Honor, is  
2 Defendants' DD, Science Digest, from May of 1954. And the  
3 reference at page 15, "The original Kent Micronite filter  
4 was a combination of cotton and asbestos fibers."

5 At this point, Your Honor, I would like to read a  
6 stipulation of the parties.

7 THE COURT: Very well.

8 MR. OHLEMEYER: The parties have agreed and stipulate  
9 to the following: The Fullam Laboratories was employed by  
10 P. Lorillard to do electron microscopy after May of 1956.  
11 Kool filtered cigarettes were introduced in August of  
1956.

12 Prior to August of 1956, Kool cigarettes were sold as  
13 unfiltered menthol cigarettes. Marlboro filtered  
cigarettes

14 were introduced in March of 1955. And finally, the first  
15 Surgeon General's report was issued on January 11th, 1964.

16 THE COURT: Ladies and gentlemen, a stipulation is an  
17 agreement between the parties on both sides that what has  
18 been stated is true.

19 MR. OHLEMEYER: I would now, Your Honor, like to read  
20 previously designated portions of Mr. Horowitz's  
deposition

21 taken on April 6th and 7th of 1955 -- I'm sorry, 1995.



22 MR. OHLEMEYER: Reading from page 145, Your Honor,  
23 line 11 through 146, line 30.

24 "Question: Am I correct then, Doctor, that you  
25 started smoking Kent cigarettes sometime after you  
26 moved to Cleveland?

27 "Answer: Right."

28 MS. CHABER: Where are you reading?

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1971

1 MR. OHLEMEYER: Page 145, line 11.

2 "Question: Am I correct then, Doctor, that you  
3 started smoking Kent cigarettes sometime after you  
4 moved to Cleveland?

5 "Answer: Right.

6 "Question: At the time you started smoking Kent  
7 cigarettes, the filter was blue?

8 "Answer: Light blue.

9 "Question: At a point sometime after you started  
10 smoking Kent cigarettes, the filter changed colors to  
11 white?

12 "Answer: Correct.

13 "Question: And the best of your recollection is that  
14 was four years or so after you started?

15 "Answer: Something like that, yeah.

16 "Question: And during the time period you smoked Kent  
17 cigarettes, you smoked a pack or less a day?

18 "Answer: Right.

19 "Question: And you smoked Kent cigarettes until you  
20 quit smoking entirely?

21 "Answer: Correct."

22 Next portion, Your Honor, is at page 149, lines 21  
23 through 150, line 4.

24 "Question: And I'm correct, Doctor, am I not, that at  
25 the time you started smoking Kent cigarettes, the  
26 filter was described as a Micronite filter?

27 "Answer: Yes. Micronite.

28 "Question: Did there come a time when the term

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1972

1 'Micronite' was discontinued or not used to describe  
2 the filter of Kent cigarettes?

3 "Answer: I think -- I think when the color changed,  
4 the word appeared -- disappeared, I mean, that's my  
5 thought."

6 Page 151, line 3 through 152, line 3.

7 "Question: Do you recall any changes in the  
8 popularity of Kent cigarettes when you smoked?

9 "Answer: Oh, yeah.

10 "Question: Do you understand the question, Doctor?

11 "Answer: I understand the question.

12 "I mean, more and more of my friends were smoking  
13 them. The ladies who were smoking were also beginning  
14 to smoke Kents more noticeably.

15 "The packages were more attractive and I saw very  
16 lovely ads for them. And it seemed to me  
17 sometime that Kent may have been one of the very few  
18 outstanding brands in terms of popularity, it seemed  
19 to me.

20 "Question: At the time you started smoking Kent  
21 cigarettes, did you know anybody else who smoked them?

22 "Answer: Oh, yeah. Oh, yeah.

23 "Question. Was it a brand of cigarettes that was  
24 popular among your friends?

25 "Answer: Well, it was either Marlboro or Kent,  
26 mostly.  
27 "Question: Do you recall any changes in the taste or  
28 flavor of Kent cigarettes while you smoked them?

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1973

1 "Answer: I -- not noticeably, but there was a subtle  
2 change towards a lightness. It seemed like the filter  
3 provided more air when you inhaled."

4 Page 152, lines 4 through 6.

5 "Question: Do you recall any changes in the price of  
6 Kent cigarettes when you smoked them?

7 "Answer: I can't recall that, no."

8 Page 154, lines 3 through 6.

9 "Question: And in this lawsuit, Doctor, am I correct  
10 that you've sued a number of manufacturers and  
11 suppliers of asbestos-containing material?

12 "Answer: Yes."

13 Page 154, lines 11 through 18.

14 "Question: And do you recall initiating -- or having  
15 the first complaint in this case filed in November of  
16 1994?

17 "Answer: I believe so, yes.

18 "Question: Are you aware that in December -- December  
19 29th of 1994, the complaint was amended to add  
20 Lorillard to the lawsuit?

21 "Answer: I was not aware of the details of it, what  
22 preceded what, and so on. I was not aware of that."  
23 Next exhibit, Your Honor, is Defendants' NN, which is  
24 an advertisement for Kent cigarettes that appeared  
September

25 17th of 1956 in the Cleveland Press and September 17th of  
26 1956 in the Cleveland Plain Dealer. "Kent now at popular  
27 filter price."

28 I would now like to read, Your Honor, from the

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1974

1 deposition of Mrs. Horowitz taken on Tuesday, May 9th,  
1995.

2 Reading at page 33, line 21 through 36, line 24.

3 "Question: Do you know a gentleman by the name of  
4 Elliott Foxman?

5 "Answer: Yes, I do.

6 "Question: Tell me when and how you became acquainted  
7 with Mr. Foxman, Dr. Foxman.

8 "Answer: I became acquainted with him and his family  
9 in Topeka, Kansas in the late forties. He was  
10 training at Menninger in Winter VA Hospital, as was my  
11 husband. He was in training as for psychiatrist. My  
12 husband was in the psychology training program.

13 "Question: Same institution, different programs?

14 "Answer: Right.

15 "Question: Did you socialize with the Foxmans at that  
16 time? Let me ask a better question. Was Dr. Foxman  
17 married at the time?

18 "Answer: Yes. What was his wife's name?

19 "Answer: Anita.

20 "Question: Are they still married?

21 "Answer: Yes.

22 "Question: Did you socialize with the Foxmans while  
23 you were in Topeka?

24 "Answer: Yes.

25 "Question: What happened to the Foxmans when you and

26 Dr. Horowitz moved to Cleveland?  
27 "Answer: I don't quite recall the sequence of events,  
28 but they left and he went into -- Foxman went into the  
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1975

1 Army and served a period there. And I believe we  
2 stayed on after they had -- in Topeka.  
3 "When we moved to Cleveland, I just happened to be at  
4 A children's play, drama program, and I saw Anita  
5 waiting to pick up her kids and realized that they  
6 were in Cleveland at the same time.  
7 "Question: So how long did you and the Foxmans live  
8 in Cleveland at the same time?  
9 "Answer: I'm not clear about just when they moved to  
10 Los Angeles. Okay. Thank you. I really can't say  
11 specifically, but they were here and we were planning  
12 to move to Los Angeles.  
13 "Question" -- I should point out the deposition was  
14 taken in Los Angeles.  
15 "Question: How long after you had moved to Cleveland  
16 did you run into Mrs. Foxman?  
17 "Answer: Let me think now. It was about six years.  
18 "Question: Do you know when the Foxmans moved to  
19 Cleveland?  
20 "Answer: No.  
21 "Question: And during the time that you lived in  
22 Cleveland with the Foxmans, would you see them on a  
23 Regular basis?  
24 "Answer: Not on a regular basis; occasionally.  
25 "Question: How often in a typical year would you see  
26 the Foxmans?  
27 "Answer: I would see them two or three times a year.  
28 But my husband played poker with Elliott, so that he  
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1976

1 would see them -- him more often.  
2 "Question: Was the poker game once a month? Once  
3 every two months?  
4 "Answer: I don't know.  
5 "Question: Did your husband and Dr. Foxman work in  
6 the same building at Cleveland?  
7 "Answer: I don't believe so.  
8 "Question: Am I correct, Mrs. Horowitz, that your  
9 best recollection is that you moved to Cleveland  
10 before the Foxmans did, but they moved to Los Angeles  
11 before the Horowitzes did?  
12 "Answer: Right. Well, wait a second now, I'm sorry.  
13 I -- no, I'm not sure when they moved to Cleveland,  
14 whether it was before or after we did.  
15 "Question: But you didn't run into Mrs. Foxman  
16 until --  
17 "Answer: Right.  
18 "Question: -- "sometime after you moved?  
19 "Answer: Yes."  
20 MS. CHABER: And Your Honor, Mrs. Horowitz sent in a  
21 correction to the deposition as follows, on page 35, line  
22 18. The question begins at line 16.  
23 "How long after you had moved to Cleveland did you run  
24 into Mrs. Foxman?  
25 "Answer: Let me think now. It was about two years."  
26 July 18th, 1995.  
27 MR. OHLEMEYER: The date of the correction was July  
28 18th, 1995.

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1977

1 Reading from page 77, line 10 through 78, line 2.

2 "Question: Do you recall whether the Surgeon  
3 General's report, the government report on cigarette  
4 smoking, was released before or after you quit  
5 smoking?

6 "Answer: After.

7 "Question: What about your husband, was it before or  
8 after he quit smoking?

9 "Answer: I think it was before.

10 "Question: Did it have anything to do with his  
11 decision to quit smoking?

12 "Answer: That and -- it may have. But, also, he was  
13 starting to cough more in the mornings. And he was  
14 swimming on a regular basis, and I think he realized  
15 that it had some effect on his breathing and his  
16 swimming and coughing. So he decided he -- even his  
17 barber had told him he read a book and decided to  
18 quit. He quit. And he felt if his barber could do  
19 it, he could do it. And so he did."

20 Page 103 line 11 to 104, line 18.

21 "Question: As best you can recall, when was it that  
22 you can remember Kents being around your husband when  
23 you were smoking?

24 "Answer: I don't specifically recall except that --  
25 that was the only, you know, that was the brand name  
26 and the house cigarette. But I don't recall just  
27 when, how much, or whether there was -- what the  
28 specifics were.

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1978

1 "Question: And other than your somewhat vague  
2 recollection about Chesterfield, you're not able to  
3 tell us what your husband was smoking before he smoked  
4 Kents; is that right?

5 "Answer: Except that if I smoked it, then he had to  
6 smoke it.

7 "Question: And that's why you remember the  
8 Chesterfield; right?

9 "Answer: Right.

10 "Question: But other than the Chesterfields, you're  
11 not able to tell us anything else your husband smoked?

12 "Answer: Right. No."

13 MS. CHABER: There's another portion, a  
14 counter-designation, Counsel.

15 MR. OHLEMEYER: I didn't understand there were  
16 counter-designations to my reading.

17 MS. CHABER: Your Honor, we went over this.

18 THE COURT: I don't know specifically. If there's a  
19 disagreement, we will have to discuss it.

20 MR. OHLEMEYER: What is it you wanted to read?  
21 (Discussion off the record.)

22 MR. OHLEMEYER: I don't have a problem, Your Honor,  
23 with that.

24 THE COURT: All right.

25 MS. CHABER: 73, 18 to 74, 10.

26 "Question: Beside Kent, can you recall any other  
27 brands of filtered cigarettes that you smoked?

28 "Answer: No.

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1979

1 "Question: Why is it that you remember Kent?

2 "Answer: Because that was what was around the house  
3 for many, many years.  
4 "Question: Can you describe for us any other brand of  
5 cigarettes that you recall being around the house at  
6 any time when either you or your husband was a  
7 cigarette smoker or cigarette smokers?  
8 "Answer: No.  
9 "Question: Your husband told us that you started  
10 smoking Kent sometime after he did; is that your  
11 recollection?  
12 "Answer: I don't have a clear recollection of what I  
13 smoked and when I smoked it, but I know that whatever  
14 he smoked, I smoked."  
15 MR. OHLEMEYER: Your Honor, this is Defendants'  
16 Exhibit FF. It's the December 27th, 1952 edition of  
17 Business Week, a chart at page 41.  
18 "Estimated Domestic Tax-Paid Sales, Billions of  
19 Cigarettes. Regular size, King Size Filter Tip." And  
under  
20 the column labeled "Share of Market for 1952," Kent is  
21 described as .2.  
22 Defendants' Exhibit GG, Your Honor, is a January 2nd,  
23 1954 Business Week article. The table at page 75 under  
the  
24 column for "Share of Market," Kent's percentage is listed  
as  
25 one-tenth of a percent for 1953.  
26 From Defendants' Exhibit Y, page 65, 1954 percentage  
27 of market, Kent is listed as point six-tenths of one  
28 percent.  
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1980  
1 Defendants' Exhibit G -- I'm sorry, Defendants'  
2 Exhibit KK is December 28th, 1957 Business Week. And the  
3 comparison between sales and billions of cigarettes in 1956  
4 to 1957, the percentage change for 1957 is shown for Kent  
as  
5 316 percent. Total sales in '56 is listed as three  
billion.  
6 Total sales in '57 is listed as 12-and-a-half billion.  
7 Defendants' Exhibit LL is Business Week for December  
8 27th, 1958. The percentage change for Kent from '57 to '58  
9 is listed as 177 percent. Sales in '57 are listed as 13.5  
10 billion. Sales in '58 are listed as 37.5 billion. And in  
11 1958, rank is listed as 5 compared with the 1957 rank of  
11.  
12 And finally, Your Honor, I would like to read portions  
13 of Plaintiffs' 21, which, as I understand it, is in  
14 evidence. This is Kent cigarettes marketing and  
advertising  
15 plans, 1957, dated November 1956, prepared by Young &  
16 Rubicam. This is page 10. Product improvement.  
17 "While these tests were going on, a major product  
18 improvement was made in Kent, a new filter was adopted. A  
19 new filter gave Kent a much easier draw, better flavor,  
and  
20 reduced the cost of manufacture. This improved product  
21 replaced the old Kent in the Wisconsin market in the  
spring  
22 of 1956, but was not supported by new product advertising  
23 because of the fear the announcement of a product change  
24 following closely on a price reduction might tend to  
cheapen

25 the product in the minds of some consumers. The new  
product  
26 was subsequently put into national distribution in May of  
27 1956."

28 Page 11, "National price drop." In June 1956, the P.  
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1981

1 Lorillard Company decided to make the price reduction  
2 national in scope effective at the consumer level September  
3 17th, 1956. The price reduction was announced and promoted  
4 through heavy extra advertising expenditures in newspapers,  
5 television, radio, and in store point of sale."

6 And then this is a chart that is contained within the  
7 exhibit that shows filter sales 1952 to 1956. The bar at  
8 the bottom represents Kent and other brands of filtered  
9 cigarettes are shown from year to year to year to year to  
10 year.

11 Your Honor, at this point, we'd move previously marked  
12 VV, XX and WW into evidence, which are the Tower Imaging  
13 reports.

14 THE COURT: All right.

15 MS. CHABER: No objection.

16 (Defendants' Exhibits VV, XX and WW received in  
17 evidence.)

18 MR. OHLEMEYER: And then perhaps we could take a break  
19 and take up the Reader's Digest question.

20 THE COURT: All right.

21 MS. CHABER: And we also have other exhibits that  
22 aren't reflected as in evidence, but that there was  
23 agreement on.

24 THE COURT: Ladies and gentlemen, you understand that  
25 all of these items that are exhibits are available to you  
26 when you go out to deliberate. You can look at them at  
your

27 own leisure and study them to whatever extent you deem  
28 appropriate and necessary.

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1982

1 However, you must keep in mind that anything that is  
2 read to you from a deposition, the deposition, as such, is  
3 not in evidence, so you have to rely upon what was orally  
4 read to you from that deposition. Keep that in mind.

5 All right. We will take a recess until 11:00 o'clock.

6 Please keep in mind the admonitions given to you before  
that

7 you are not to form an opinion about the case, you are not  
8 to discuss the case amongst yourselves or with anyone else,  
9 and you are not to make any independent investigations  
about

10 anything in connection with the case. Return at 11:00  
11 o'clock, please.

12 (Recess taken.)

13 (In open court outside the presence of the jury.)

14 MR. OHLEMEYER: What we are going to do, the plaintiff  
15 is going to read --

16 MS. CHABER: Why don't we deal with the other one.

17 MR. OHLEMEYER: I'm sorry. The issue is, Your Honor,  
18 an August 1957 Reader's Digest article previously marked  
as

19 Defendants' CC, and I just want to read the two sentences  
20 that describe the use -- describe the use in the past of  
21 asbestos in Kent cigarettes. Offered for all the same  
22 reasons.

23 THE COURT: Page 46?  
24 MR. OHLEMEYER: Yes, sir, offered for all the same  
25 reasons we discussed yesterday.  
26 MS. CHABER: Your Honor, at this point in time, this  
27 is after the fact.  
28 THE COURT: What do you mean?  
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1983  
1 MS. CHABER: 1957 -- Your Honor, they stopped making  
2 the cigarettes in 1956. This is not during the time that  
3 the cigarettes were on the market, and my objection --  
4 THE COURT: I don't know what the article says. What  
5 does it talk about? I've just been handed it.  
6 MR. OHLEMEYER: Read the portion that I've bracketed.  
7 THE COURT: You've got a yellow piece of paper on here  
8 with some red scratches on it. I don't know what you're  
9 trying to show to me.  
10 MR. OHLEMEYER: Right here.  
11 THE COURT: Along to the left of these scratches?  
12 MR. OHLEMEYER: See there where it says "The Atomic  
13 Energy Commission"? Those are the two sentences I want to  
14 read.  
15 THE COURT: I'll read it to myself.  
16 MR. OHLEMEYER: Thank you. It's an historical fact,  
17 apparently, about crocidolite and Kent cigarettes, and in  
18 1952 --  
19 THE COURT: Correct.  
20 MR. OHLEMEYER: -- the AEC used it. And it's offered  
21 to show that the use of asbestos in the cigarette was not  
22 a  
23 secret.  
24 MS. CHABER: It's after the fact, Your Honor.  
25 THE COURT: Just a minute. The article is dated  
26 August 1957. It doesn't show anything that occurred  
before  
27 its publication, to me. That section doesn't show me  
28 anything.  
29 MR. OHLEMEYER: Correct. And I've shown the jury  
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1984  
1 evidence during the time period '52 to '56, but this is  
just  
2 another piece of evidence as to what was known at or near  
3 the time about the use of the asbestos. I'm not offering  
it  
4 to prove that asbestos was used during those four years.  
5 That's a matter, like I said, we are not disputing. It's  
6 just evidence of who knew what, when they knew it. And if  
7 the argument is that it doesn't prove what the Reader's  
8 Digest knew in 1952, that's fine. That can be argued. But  
9 it does show they knew it in 1957.  
10 MS. CHABER: After they no longer were selling it.  
11 Your Honor, I think it's irrelevant, I think it's  
12 prejudicial. I think it's cumulative of what he's already  
13 put in during the time period. He acknowledges that it's  
14 cumulative of that.  
15 MR. OHLEMEYER: Not at all.  
16 THE COURT: Let her finish. Then you can respond and  
17 I'll decide.  
18 MR. OHLEMEYER: I'm sorry.  
19 MS. CHABER: And it's after the fact. It did not  
20 occur during the time period while they were selling it,  
and

21 it's being used to argue that they told people what was in  
22 this filter of the cigarette at the time that they were  
23 selling it. After the fact seems to be irrelevant.  
24 MR. OHLEMEYER: Well, I don't think it will take much  
25 time, Your Honor. It is not cumulative to any other  
26 evidence I put in from Reader's Digest or from that time  
27 period, and I think it's relevant to show what was known,  
28 what was said, and in what form it was said during a time  
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1985

1 period that is close enough in time to have some relevance  
2 to it, to whether anybody wanted to keep this a secret or  
3 not let people know about it.

4 THE COURT: Submitted?

5 MR. OHLEMEYER: Yes.

6 THE COURT: Denied.

7 MR. OHLEMEYER: And the grounds, Your Honor?

8 THE COURT: Grounds are that it's cumulative and  
9 irrelevant.

10 MR. OHLEMEYER: For the record, then, I need to read  
11 to her the exhibit numbers.

12 MS. CHABER: Why don't you do yours.

13 MR. OHLEMEYER: Defendants' Exhibit R, Defendants' N,  
14 Defendants' O, Defendants' Y, Defendants' W, Defendants'  
15 X -- Defendants' Z is the same thing as O, so I'll pull  
that

16 out -- and Defendants' AA and DD.

17 THE COURT: All admitted without any problem?

18 MR. OHLEMEYER: Yes, for the purposes in which they  
19 were used. Is that right?

20 MS. CHABER: Yes.

21 (Defendants' Exhibits N, O, R, W, X, Y, AA, DD  
22 received in evidence.)

23 MR. BRAKE: Your Honor, understanding that you just  
24 ruled on this Readers Digest article, and understand that  
I

25 haven't taken a run at anything after you ruled yet --

26 THE COURT: You've been most cooperative.

27 MR. BRAKE: -- let me just point out why this ought to  
28 go into evidence, if I understand it correctly, and if I  
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1986

1 don't, Counsel will explain it to me.

2 THE COURT: Are you talking about this same section?

3 MR. BRAKE: Yes, Your Honor, because it says something  
4 that is directly contrary to, if I understand the article  
--

5 THE COURT: Well, maybe the article does. I only read  
6 a sentence or two.

7 MR. BRAKE: The thing is, Your Honor, here's the deal.

8 Counsel, in her opening, made a big deal of first that it  
9 was a real secret that there was asbestos in the filter,  
and

10 we've been through that, but also, that they didn't tell  
the

11 public that they changed it to cellulose acetate.

12 And I think this goes to that issue, the fact that

13 here's the Reader's Digest, greatly read by the middle

14 class. It's out there widely distributed magazine. It's

15 got this article about Kents, and it makes clear, I think,

16 that they had crocidolite asbestos and now they have

17 cellulose acetate, if I understand it correctly.

18 It's a statement directly contrary to what Counsel



19 argued in her opening and will argue again, that this was  
a  
20 big secret that there was crocidolite asbestos and now  
it's  
21 cellulose acetate.  
22 THE COURT: And now is there some particular sentence  
23 that you're talking about, other than those two that I  
just  
24 read at Mr. Ohlemeyer's behest?  
25 MS. CHABER: And I'd ask that they show it to me, as  
26 well. Could I see what you're going to show the judge  
27 before you show it to him?  
28 MR. OHLEMEYER: I haven't showed anything.  
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1987

1 MS. CHABER: I know.  
2 MR. OHLEMEYER: Well, what I showed you, Your Honor,  
3 it says that they used crocidolite and it made its debut in  
4 '52. In the next column it says the new filter is made of  
5 fine cellulose acetate developed especially for Lorillard  
by  
6 Tennessee Eastman.  
7 MR. BRAKE: Here it is, Judge. And the thing is, the  
8 focus in the case has been very largely on asbestos is a  
big  
9 big secret, and Counsel argued Reader's Digest is  
cumulative  
10 because Chemical Engineering and the others have been  
read.  
11 This is the crocidolite, and I don't think that's  
12 cumulative, either, because Reader's Digest is a very  
widely  
13 distributed magazine, and it goes to the fact that --  
she's  
14 going to argue Monday, Judge, what a big secret.  
15 The second secret she said in her opening, they didn't  
16 tell anybody when the asbestos came out and then there was  
17 cellulose acetate filter, they didn't tell them about the  
18 new filter. In '57, the year after the new filter comes  
on  
19 the market, there it is in the Reader's Digest, so it  
rebutts  
20 this inference that Lorillard was doing all this secret  
21 stuff from the public and therefore, should now be found  
22 liable or punished for that.  
23 THE COURT: All I read was two sentences in a 1957  
24 article that says a secret something or other report is  
25 released by the Atomic Energy Commission.  
26 MR. BRAKE: As I understand it --  
27 THE COURT: Let me see what you're talking about.  
28 That's all I can rely upon is what I read.  
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1988  
1 MR. BRAKE: It's yellow highlighted and it's blown up  
2 here. It talks about how the old filter tip was made of  
3 cotton fibers containing crocidolite, and it made its debut  
4 in early '52.  
5 MR. OHLEMEYER: And just under the highlight it says  
6 Kent's new Micronite filter.  
7 THE COURT: Still, that doesn't tell me anything.  
8 It's after the fact. I don't know, and I don't see that it  
9 elucidates or clarifies or does what you say it does.  
First

10 of all, it's 1957, and those things that you've  
highlighted  
11 don't say anything about it made its debut in 1952, so it  
12 did. But it doesn't say what was said.  
13 Everybody acknowledges it made its debut in 1952. And  
14 by other evidence, you've shown it was asbestos in the  
15 filter. There's no question about that. But that article  
16 doesn't tell me that where it's highlighted.  
17 MR. BRAKE: What I think it tells you, Your Honor, is  
18 relevant to the case when the Plaintiff turns around and  
19 says -- see, what her claim is, is that since everyone  
knew  
20 asbestos was a potentially harmful substance, Lorillard  
21 didn't want -- and, for that matter, Hollingsworth and  
22 Vose -- didn't want the public to know there was asbestos,  
23 so they quote "kept it a secret."  
24 And also kept it a secret -- I'm not sure quite what  
25 inferences she wants to draw, but the use of cellulose  
26 acetate in '57 as a substitute was supposedly a secret.  
27 Now, my point is really, it's not a secret if the Reader's  
28 Digest, in all places, is telling the public exactly  
what's

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1989

1 in it.  
2 THE COURT: But it doesn't matter what was it in in  
3 1957.  
4 MR. BRAKE: It matters that it wasn't a secret. The  
5 magazine --  
6 THE COURT: It's 1957 and I don't see the relevance of  
7 something in 1957 that rehashes something else that  
occurred  
8 before. That doesn't make that it did occur because  
9 Reader's Digest said it occurred. Where's the original  
10 source that says it?  
11 MR. OHLEMEYER: We are not offering to prove that it  
12 occurred. We are offering to prove that it wasn't a  
secret.  
13 MR. BRAKE: It's widely known to the public. We are  
14 going to hear all about secrets on closing argument.  
15 THE COURT: I'm not going to admit it.  
16 MS. CHABER: Your Honor, I move the following items  
17 into evidence. First of all, I think that we have not put  
18 on the record the Court's ruling on Plaintiffs' Exhibit  
21,  
19 which is the Kent marketing advertising plan, the portion  
20 that relates to the change in the advertising due to the  
FTC  
21 regulations.  
22 THE COURT: Yes, well, I don't know what those  
23 proposed numbers are.  
24 MS. CHABER: The only one I wanted to move into  
25 evidence, Your Honor, and the only one that all of that  
26 judicial notice and all of those other documents were for  
27 were for the statement contained within Plaintiffs'  
Exhibit

28 21. 21 is coming into evidence, but it's a question of  
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1990

1 whether it's coming in with or without the portions that  
2 relate to the changes in the advertising due to FTC  
3 regulations that I read into the record yesterday at page  
4.

4 And I could pass it up to the Court.  
5 THE COURT: The changes in the advertising may be  
6 shown, but I think it's erroneous to say it came about  
7 because they were forced by the FTC. The FTC -- I mean,  
all  
8 the correspondence that I read and what I understood it to  
9 be is that they were doing it voluntarily, whatever; there  
10 was economic pressure, whatever it was, but it was not  
11 because of an order.  
12 There were some regulations that were proposed, but  
13 they say in there, you know, in their correspondence, that  
14 there has to be issued an order, or something to that  
15 effect, by the FTC. And then if it isn't complied with,  
16 they are entitled to court procedures or determination as  
to  
17 whether it's appropriate or not. And that never occurred.  
18 MS. CHABER: Because they complied.  
19 THE COURT: Sure, they complied. It's like me telling  
20 you that if you do that, I'm going to find you in  
contempt,  
21 and so you don't do it.  
22 MS. CHABER: Fine. All I want is the statement that's  
23 in the advertising plan.  
24 THE COURT: You can have it, but don't say anything  
25 about the FTC, that's all.  
26 MS. CHABER: That's the statement, though. If the  
27 court reads just that portion --  
28 THE COURT: They say was forced -- whether they say  
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1991  
1 that or not doesn't matter. It wasn't. It wasn't a court  
2 order. It wasn't required by law, and so I can't take  
3 judicial notice of that kind of thing. They had some  
4 hearings.  
5 MS. CHABER: Of guidelines. They were guidelines.  
6 THE COURT: They are guidelines that they announced,  
7 and so on.  
8 MS. CHABER: And the interpretation --  
9 THE COURT: I'm not going to admit anything except  
10 that they changed their plan, their advertising plan. And  
11 why it came about is up to anything you want to say that's  
12 within the purview of the evidence, but the evidence will  
13 not include the FTC proposed regulations, unless those are  
14 admitted as proposed regulations and they stipulate to  
them,  
15 but I don't see the significance of them.  
16 Sure, they were coerced into it because they didn't  
17 want something bad to happen to them, no question about  
it,  
18 but that doesn't give rise to being forced in the sense  
that  
19 somebody issues an order and says: You do this or you go  
to  
20 jail --  
21 MS. CHABER: I understand the Court's ruling.  
22 THE COURT: -- or you're fined.  
23 MS. CHABER: Within the parameters of your ruling,  
24 then, I would like to redact this as follows: Beginning  
in  
25 March 1954 Kent copy with its heavy emphasis on health  
26 protection retired to a much weaker set of selling points.  
27 Then that deletes the part about was forced by FTC  
28 restrictions to retire. The smoke test was eliminated.

1 Such claims as the protection you need against tar and  
2 nicotine also were taken out. And then I would delete the  
3 other references to the FTC because that, at least, gives  
4 the timing, Your Honor.

5 THE COURT: All right. If there's no objection. If  
6 there's an objection, I want to know what.

7 MR. OHLEMEYER: Any change in the advertisement can be  
8 demonstrated by the advertisements that are in evidence.

9 MS. CHABER: I don't have the dates on the ads. The  
10 ads in evidence don't have dates on them.

11 MR. OHLEMEYER: We can work this out. You propose  
12 something to me and we will redact it. We can work it  
out.

13 THE COURT: All right.

14 MS. CHABER: I want to be able to demonstrate that by  
15 1954, there were no more ads or advertising that  
proclaimed

16 health claims. It's significant.

17 THE COURT: Then stipulate to that.

18 MR. OHLEMEYER: I'm not going to stipulate to that.

19 What's happening here, Your Honor, is Counsel doesn't have  
20 her ducks in a line in terms of the dates on her ads, and  
21 that or may not be beside the point, but we have talked  
22 about redacting --

23 MS. CHABER: I don't have the same resources to get  
24 copies of 1954 advertising.

25 MR. OHLEMEYER: We have talked about this before. We  
26 will have it redacted in a form that goes to the jury in a  
27 form we can agree to.

28 MS. CHABER: But in the meantime, Your Honor, so we  
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1993

1 don't have to deal with this again, I would move  
Plaintiffs'

2 Exhibit 21 into evidence. It is not in evidence.

3 MR. OHLEMEYER: It is in evidence with the  
4 understanding we are redacting references to the FTC.

5 THE COURT: That's fine. If the reporter got it. I  
6 don't know whether she did or not.

7 MR. OHLEMEYER: We will.

8 (Plaintiffs' Exhibit 21 received in evidence.)

9 MS. CHABER: Plaintiff's 29 into evidence, 87, 104,  
10 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122,  
123,

11 125, 126, 127, 128 -- 124 got one out of order, with the  
12 understanding that there's some marginalia that needs to  
be

13 redacted on that one.

14 Did I say 129? 129, 130, 133, 135, 136, 137, 138,  
15 139, 140, 141, 142, 147, 149, 150, 151, 152, 153, 155,  
156,

16 157, 161, 162, 163, 164, 165, 166, 167, 169, 170, 171,  
172,

17 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183,  
184,

18 185, for limited purpose, 190, Plaintiffs' 11, 12 and 13.

19 MR. OHLEMEYER: Which I object to, Your Honor, as  
20 being nothing more than blow-ups of what has already been  
21 admitted as part of Plaintiffs' 46.

22 MS. CHABER: Your Honor, these were the ones where I  
23 had to cut the ends off where Dr. Hammar identified them.

24 They have subsequently, in another set, been identified by  
25 Hallgren, but there may be confusion with the jury because  
26 when Dr. Hammar identified them, they didn't have the  
27 marginalia on it. It didn't have -- and so I move them  
into

28 evidence as they are so that I can show that these are the  
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1994

1 same ones that Hammar identified and Hallgren identified.

2 THE COURT: Well, are they simply -- you don't need

3 both sets?

4 MS. CHABER: I don't need both sets to go into the

5 jury room, but I need to be able at least to use it in

6 closing.

7 MR. OHLEMEYER: You can use them demonstratively. I

8 don't have a problem with that.

9 THE COURT: Use them demonstratively and withdraw

10 whichever set you don't want to go to the jury.

11 MS. CHABER: So I just want it understood, so somebody

12 doesn't jump up and says: Those aren't in evidence. You

13 can't show them to the jury. They are 11, 12 and 13.

14 THE COURT: They go into evidence.

15 (Plaintiffs' Exhibits 11, 12, 13, 29 87, 104, 112,

16 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123,

124,

17 125, 126, 127, 128, 129, 130, 133, 135, 136, 137, 138,

139,

18 140, 141, 142, 147, 149, 150, 151, 152, 153, 155, 156,

157,

19 161, 162, 163, 164, 165, 166, 167, 169, 170, 171, 172,

173,

20 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184,

185,

21 190 received in evidence.)

22 MS. CHABER: And then initially, when we started

23 marking charts, they were being marked for demonstrative

24 purposes. They may still be considered that way. I don't

25 know whether things have shifted, but I noticed things

were

26 being moved into evidence, and I have expert charts that

27 were likewise that I'd like to move into evidence, and

then

28 I think they either probably all go in or none go in, and

we

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1995

1 can use them all.

2 MR. OHLEMEYER: Your Honor, I think none should go in,

3 actually. I think they are cumulative of the witness'

4 testimony and potentially confusing and misleading. And to

5 the extent that we have a couple in evidence, I'll withdraw

6 them and withdraw them all. I think none should go in.

7 MS. CHABER: I think they all should be marked and be

8 able to be used during argument, and then I would probably

9 agree that -- unless.

10 MR. OHLEMEYER: Then we should mark everything.

11 MS. CHABER: No.

12 THE COURT: Anyone's that are going to be used in

13 argument should be marked and referred to during the

course

14 of the argument.

15 MS. CHABER: They are marked.

16 THE COURT: All right. That's true of all of them

17 that are going to be used should be marked.  
18 MS. CHABER: 22, 23, 24.  
19 THE COURT: But not be available for the jurors to  
20 study in their deliberations, during their deliberations.  
21 MS. CHABER: Right. 24, 25, 26, 96, 97.  
22 MR. OHLEMEYER: Then is it my understanding then that  
23 Defendants' R that has been marked can be used in  
argument?  
24 THE COURT: Correct.  
25 MR. OHLEMEYER: But not in evidence. Okay. Thank  
26 you, Your Honor.  
27 MS. ROENISCH: So none of those charts are in  
28 evidence?

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1996

1 THE CLERK: They are for identification.  
2 MS. CHABER: And then, Your Honor, Plaintiffs' Exhibit  
3 187 marked for identification.  
4 MR. OHLEMEYER: Put the whole thing in evidence. I  
5 don't care. Put the whole article into evidence.  
6 MS. CHABER: I wanted to read one portion of it.  
7 MR. OHLEMEYER: I object to it unless we put the whole  
8 article in evidence.  
9 MS. CHABER: I wanted to publish a portion in the same  
10 way that counsel has been publishing portions that go to  
11 cigarette prices --  
12 THE COURT: Fine.  
13 MS. CHABER: -- that note that cigarette prices differ  
14 and vary from store to store and noted how much they paid  
15 for various cigarettes that they used in the testing. It  
16 was raised by them as an issue with respect to this notice  
17 of premium price and now at popular prices.  
18 THE COURT: What's the objection?  
19 MR. OHLEMEYER: Well, my objection is I have some --  
20 if Counsel wants to put in, offer evidence for -- it's a  
21 hearsay objection. She's offering this evidence for the  
22 truth of the matter what cigarettes cost. If she wants to  
23 do that, I have a lot of evidence that I will do likewise.  
24 I think it's time-consuming, it's prejudicial, it's  
25 unnecessary and it's hearsay.  
26 THE COURT: What's the point of refuting what the  
27 price of the cigarettes was --  
28 MS. CHABER: Well --

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1997

1 THE COURT: -- what the defendant says it was?  
2 MS. CHABER: I suspect that this is the following  
3 argument that will be made, Your Honor. Mr. Horowitz  
4 couldn't possibly have smoked our cigarettes because he  
5 didn't remember that they cost more, that they cost more  
6 than other cigarettes.  
7 That was the whole point of that ad being put up  
8 there, that this change in 1956, you know, now at popular  
9 price, that's part of -- Your Honor, what you will see in  
10 closing is basically a little listing of everything that  
my  
11 client didn't get right, in terms of their evidence that  
he  
12 didn't smoke the cigarettes, and one of them is price and  
13 one of them is, you know, color, length, size, whatever  
the  
14 descriptive thing is, and that was the whole point of  
15 Mr. Ohlemeyer's ad at the end about the popular price and

16 the change in the price, and I'm offering this as another  
--  
17 MR. OHLEMEYER: It's being offered for the truth of  
18 the matter and I object to it as hearsay.  
19 MS. CHABER: It's being offered for what Consumer  
20 Reports is saying that prices cost, not for the truth or  
21 not. I don't know whether they cost that or not. I don't  
22 care whether they cost that or not. But that's what they  
23 published.  
24 THE COURT: If that's a major issue, the price of the  
25 cigarettes and they lowered the price and that made them  
26 more popular or something, that's significant as to what  
the  
27 plaintiff purchased. Then I guess she can refute it by  
the  
28 same kind of documentation.

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1998

1 MR. OHLEMEYER: That's the point, Your Honor, the  
2 plaintiff has rested. If she wants to --  
3 MS. CHABER: Do you want me to wait for rebuttal?  
4 I'll wait for rebuttal.  
5 MR. OHLEMEYER: Will you please let me finish?  
6 I have a stack of exhibits, Your Honor, that I would  
7 like to put in evidence now to prove the exact same thing,  
8 and if counsel --  
9 THE COURT: It's already been introduced.  
10 MR. OHLEMEYER: No.  
11 THE COURT: It has.  
12 MR. OHLEMEYER: I have four other magazine articles  
13 that I'll put in on the issue of price.  
14 THE COURT: You've done it with an ad and you've done  
15 it by some other premium prices.  
16 MR. OHLEMEYER: But what Counsel wants to do now is  
17 prove the precise cost, what cigarettes cost. And if  
she's  
18 going to do that with hearsay evidence, then I want the  
same  
19 opportunity.  
20 THE COURT: Fine. If the two of you think it's so  
21 important, price is so significant to inundate the jury  
with  
22 it, but I don't see the significance of it to determine  
23 whether or not he smoked them.  
24 MS. CHABER: I will withdraw it, Your Honor. If it  
25 becomes relevant, I will offer it as a rebuttal document.  
26 THE COURT: All right.  
27 MR. OHLEMEYER: Shall we continue? Ready for the  
28 jury?

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1999

1 MS. CHABER: What are we doing now?  
2 THE COURT: What do we do with the jury now?  
3 MR. OHLEMEYER: I'm going to rest my case.  
4 MR. BRAKE: Before the plaintiffs' rested, I might  
5 add.  
6 THE COURT: You're both resting?  
7 MS. CHABER: This is news to me. I was advised that  
8 they were bringing Alexander Spears.  
9 MR. OHLEMEYER: I want to rest my case, Your Honor,  
10 and as soon as you bring the jury in, we will do it.  
11 THE COURT: Are all documents in that are going to be  
12 marked in, or do they have to be presented to the jury as

13 marked?  
14 MR. OHLEMEYER: Everything is in.  
15 MS. CHABER: I don't think anybody is going to publish  
16 any more.  
17 THE COURT: No more evidence?  
18 MR. OHLEMEYER: No more evidence.  
19 MS. CHABER: Your Honor, I'm going to ask leave of the  
20 Court to wait until Monday with respect to potential  
21 rebuttal. I was advised that they were calling a witness  
22 today. And Mr. Ohlemeyer, I have been asking him for  
three  
23 days now who he was calling on Monday, if he was calling  
24 anyone else. I've asked him where Dr. Spears was. I was  
25 told: Well, we will see. We will see what time we get  
to.  
26 I said: If you want to put him over to Monday, that's  
okay.  
27 MR. OHLEMEYER: I have decided to rest my case, Your  
28 Honor.  
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2000

1 MS. CHABER: He can rest his case. I'm asking the  
2 Court for leave to wait until Monday because I may have  
some  
3 rebuttal testimony which I was anticipating for Monday, not  
4 for today, Your Honor.  
5 THE COURT: All right.  
6 MS. CHABER: Because I had every good faith belief we  
7 were going over till Monday.  
8 THE COURT: What is your proposed rebuttal testimony?  
9 MS. CHABER: I don't -- on rebuttal, I do not have to  
10 give them that same kind of notice that we have agreed  
11 about, and I cannot tell the Court right now what that is  
12 because I have --  
13 THE COURT: How long do you propose that it will last?  
14 MS. CHABER: How long do I propose that it will last?  
15 Probably ten minutes.  
16 THE COURT: All right.  
17 MS. CHABER: We have jury instructions we need to  
18 settle.  
19 MR. BRAKE: The thing that's peculiar -- I don't know  
20 what the rebuttal evidence is and she doesn't want to tell  
21 us. Dr. Spears is not my evidence. She subpoenaed him  
and  
22 Mr. Ohlemeyer said: He's here on the day you're going to  
23 subpoena him. She didn't call him. Now she has something  
24 else she wants to do. If she's going to do something on  
25 Monday and she knows what it is, she ought to tell us,  
26 because we've rested. She's rested, we've rested. If  
27 there's something else that's going to come up --  
28 MR. OHLEMEYER: I want to argue the case Monday,  
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2001

1 Judge.  
2 MS. CHABER: Excuse me, Your Honor. I subpoenaed  
3 Dr. Spears at his deposition at the conclusion of his  
4 deposition because he had refused, at Counsel's -- Counsel  
5 had instructed him not to answer throughout the deposition.  
6 There was an issue pending before the Court that was not  
7 resolved at the time, and that was the whole reason that I  
8 had subpoenaed him, because if the Court ruled in my favor  
9 on that, then I would have brought him in here.  
10 The Court did not rule in my favor on the issues



11 related to health effects of smoking with respect to risk  
12 benefit. Mr. Ohlemeyer said: Do you want the guy here?  
I  
13 said: Not in my case. Are you bringing him in yours?  
And  
14 he said: Yes. So I said: Fine. I'll wait. Because the  
15 whole point of my bringing him in related to the issues  
that  
16 he had refused to answer at his deposition. And now I've  
17 been sandbagged on that. Fine. I can live with that.  
18 The point is, Your Honor, I am going out of town on an  
19 airplane this afternoon. I was under the impression and  
20 understanding in good faith belief that we were going on  
21 over until Monday, and the things that I have in the works  
I  
22 don't -- I won't have the answers on until Monday. And I  
23 think that that is reasonable and that there was no -- I  
was  
24 falsely led in this little game-playing that's been going  
on  
25 for the last two days.  
26 I have asked Mr. Ohlemeyer every day for the last two  
27 days -- I was given a letter. I can show the Court the  
28 letter that Mr. Spears would be here today. A letter was  
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2002

1 sent to me that Dr. Spears would be here as a witness  
today,  
2 so I had every reason to believe that that was --  
3 THE COURT: Are you going to call him?  
4 MS. CHABER: No, I don't care at this point, because  
5 the Court didn't give me -- and I wasn't planning on  
calling  
6 him in my case, but the point is, Your Honor, I relied on  
7 them putting on a witness today and us going over then till  
8 Monday. I won't be back from out of town until late  
9 Saturday night. I won't even be able to check with my  
10 sources.  
11 MR. BRAKE: I ask if there is going to be rebuttal  
12 evidence, that we at least be told something of its nature  
13 for the simple reason that she has rested, seemingly; we  
14 have rested, and cases have to come to an end, and now  
this  
15 case, the evidence is at an end, and so if it's not  
16 Dr. Spears that she wants to raise an issue with, what  
else  
17 is there? That's all I really want to know.  
18 I don't think it's an unreasonable request. If  
19 there's something to be rebutted, give me some notice.  
20 She's refusing to do it because she's going out of town.  
21 Dr. Spears didn't have anything to do about it. I'd just  
22 like to know something of what it is, because I think the  
23 case is at an end.  
24 MS. CHABER: The whole point of rebuttal evidence,  
25 Your Honor, isn't that you give the defendants a week  
notice  
26 on it.  
27 MR. BRAKE: I don't want a week.  
28 MR. OHLEMEYER: Rebuttal is not somebody else to say  
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2003

1 something that could have been said in your case in chief.  
2 MS. CHABER: I understand. And I'm not planning on

3 offering anything on that nature. It will be rebuttal  
4 evidence.  
5 MR. OHLEMEYER: On what fact?  
6 MS. CHABER: I don't think I need to reveal that.  
7 MR. BRAKE: It's not the question of who gets the last  
8 word kind of thing.  
9 MR. OHLEMEYER: Your Honor, may I make a suggestion?  
10 We have made this jury wait and wait and wait and wait for  
11 a  
12 lot of different reasons, some of them fair, some of them  
13 arguably unfair. I would like to bring the jury in, rest  
14 my  
15 case, and I would like to come in Monday morning and argue  
16 the case and let them decide it so we can all move on.  
17 MS. CHABER: We have the jury instructions we have to  
18 argue.  
19 THE COURT: We have to go over jury instructions and  
20 the verdict forms. How long do you anticipate that will  
21 take and when are you proposing doing it, on Saturday or  
22 Monday?  
23 MS. CHABER: I'm not going to be here on Saturday,  
24 Your Honor.  
25 THE COURT: Then what time should we have the jury  
26 come in?  
27 MS. CHABER: If you want to have the jury hear  
28 argument in the afternoon on Monday, we are going to be  
29 arguing about jury instruction, it's going to take us  
30 awhile. We've proposed different sets of instructions. I  
31 JOANNE M. FARRELL, C.S.R. (415) 479-0132

2004

1 just got served supplemental ones by Lorillard now. I  
2 haven't even looked at them.  
3 MR. BRAKE: I think we can use the morning.  
4 MR. SCHOLL: There's just a couple of new  
5 instructions. There won't be much.  
6 MR. OHLEMEYER: Why don't we come at 8:00 Monday,  
7 argue instructions, bring --  
8 MS. CHABER: I can't be here by 8:00, Mr. Ohlemeyer.  
9 I have told you that before. I have a child that I have to  
10 either take care of or get to day care. Day care doesn't  
11 open early enough. I live in the East Bay.  
12 MR. SCHOLL: Maybe we could get the jury in here.  
13 THE COURT: Why don't we get the jury here to hear all  
14 these arguments.  
15 MR. OHLEMEYER: The jury needs to know what time to be  
16 here Monday.  
17 THE COURT: I'll have the jury come back at 1:00  
18 o'clock on Monday and you let counsel know by 8:00 a.m. on  
19 Monday whether you're going to have any rebuttal.  
20 MS. CHABER: Where am I going to find them at 8:00  
21 a.m.?  
22 MR. OHLEMEYER: Same place we always are.  
23 MS. CHABER: Where is that?  
24 MR. OHLEMEYER: 474-1180 by fax.  
25 THE COURT: You can phone them at your convenience.  
26 MR. OHLEMEYER: Fax is 474-1180.  
27 MS. ROENISCH: I'll be in my office. 978-2613 is fax.  
28 MR. OHLEMEYER: What time would you like us on Monday?

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2005

1 THE COURT: I want you here at 9:00 o'clock.  
2 THE COURT: Bring the jury in now and we will tell  
3 them.

4 THE CLERK: Yes, Your Honor.  
5 MR. OHLEMEYER: And I will, Your Honor, I'll rest my  
6 case.  
7 THE COURT: Both sides have rested subject to  
8 rebuttal, notify the defense on or before 8:00 a.m. on  
9 Monday the 28th of August.  
10 (In open court in the presence of the jury.)  
11 THE COURT: Ladies and gentlemen, thank you for your  
12 patience.  
13 MR. OHLEMEYER: Your Honor, at this point, the defense  
14 rests.  
15 THE COURT: All right. All of the jurors are present.  
16 Both sides have rested. There's a possibility of some  
17 further evidence on Monday. There's a possibility there  
18 won't be any further evidence.  
19 In any event, you're not to come back until 1:00  
20 o'clock on Monday because the case will be submitted to  
you  
21 sometime Monday afternoon, either starting at 1:00 o'clock  
22 or shortly thereafter, and I hope we don't have to have  
you  
23 wait in the hall anymore.  
24 You've been very patient, considerate and cooperative,  
25 and I'm sure you've experienced and recognized the fact  
that  
26 it's very difficult to conduct the trial of a case in an  
27 expeditious, efficient, clockwork-type situation. It just  
28 can't be done, even though we try. But you're free now  
JOANNE M. FARRELL, C.S.R. (415) 479-0132

2006

1 until 1:00 o'clock on Monday.  
2 And keep in mind the admonitions that you're not to  
3 form an opinion, you're not to discuss the case with  
4 anybody, and you're not to make any kind of an  
investigation  
5 or inquiry about anything connected with this case. Keep  
6 those admonitions in mind and we will see you Monday at  
1:00  
7 o'clock. Take care of yourselves and enjoy, to the best of  
8 your ability, your time off. See you Monday at 1:00  
9 o'clock.  
10 (In open court outside the presence of the jury.)  
11 THE COURT: See you Monday at 9:00 o'clock.  
12 MS. CHABER: Does the Court have all the jury  
13 instructions?  
14 THE COURT: I have what's been given to me. I have a  
15 set from each of you, plus supplements from the defense,  
16 plus two special verdicts. I've glanced through them all,  
17 but I haven't made any decisions or determinations about  
18 anything because I assume that you're going to resolve the  
19 obvious things amongst yourselves and you will have a  
20 limited number of questions when you come back Monday or  
21 when we talk Monday.  
22 MS. CHABER: Two special verdicts, Your Honor.  
23 THE COURT: One from the defense and one from you.  
24 MR. SCHOLL: There's two jury instructions and a  
25 special verdict.  
26 (Whereupon, court was in recess.)

27 ---o0o---

28

JOANNE M. FARRELL, C.S.R. (415) 479-0132

2007

1 REPORTER'S CERTIFICATE

2  
3 I, JOANNE M. FARRELL, A Pro Tempore Court Reporter  
4 of the Superior Court of the City and County of San  
5 Francisco, State of California, do hereby certify that I  
6 correctly reported the within-entitled matter and that the  
7 foregoing is a full, true and correct transcription of my  
8 shorthand notes of the testimony and other oral proceedings  
9 had in the said matter.

10 Dated this 24th day of August 1995  
11 San Francisco, California

12 \_\_\_\_\_  
13 JOANNE M. FARRELL, CSR# 4838

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